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**Grange Debris Box and Wrecking Company, Inc. and
Teamsters Union, Local 624.** Case 20–RC–17987
June 30, 2005

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

The National Labor Relations Board has considered a determinative challenge in an election conducted March 10, 2005, in a unit of all full-time and regular part-time truckdrivers and yard employees, and the administrative law judge’s report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election issued on February 8, 2005. The tally of ballots shows that five ballots were cast in favor of the Petitioner, two were cast against the Petitioner, and three were challenged. The challenged ballots are sufficient in number to affect the results of the election.

A hearing was held before Administrative Law Judge William L. Schmidt on May 3, 2005. At the hearing, the Petitioner withdrew its challenges to the ballots of J. Guadalupe and Alvaro Jimenez. On May 10, 2005, the judge issued the attached supplemental decision and recommended Order on disposition of challenged ballots, recommending that the case be remanded to the Regional Director to open and count the ballots of Guadalupe and Jimenez, as well as the ballot of Nick Hultberg Sr.,¹ whom the judge found to be an eligible voter.

The Employer filed limited exceptions and a supporting brief. The Employer excepted only to the judge’s findings that Hultberg was an eligible voter. The Petitioner filed an answering letter brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions. We shall remand this proceeding to the Regional Director to open and count the challenged ballots of those employees found eligible to vote and to take further appropriate action.

ORDER

It is directed that the Regional Director for Region 20 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of J. Guadalupe, Alvaro Jimenez, and Nick Hultberg Sr. The Re-

¹ The record makes clear that the correct spelling of the name of the voter at issue is “Hultberg,” not “Hulbert.” We hereby correct the judge’s misspelling of his name.

gional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

J. Mark Montobbio, Esq. (Ragghianti/Freitas, LLP), of San Rafael, California, for the Employer.

Sheila K. Sexton and Sharon Seidenstein, Esqs. (Beeson, Tayer & Bodine), of Oakland, California, for the Petitioner.

**SUPPLEMENTAL DECISION AND RECOMMENDED
ORDER ON DISPOSITION OF CHALLENGED
BALLOTS**

WILLIAM L. SCHMIDT, Administrative Law Judge. The issues for resolution here pertain to the eligibility of J. Guadalupe, Alvaro Jimenez, and Nick Hultberg Sr., to vote in the pending representation election. Based on my findings and conclusions detailed below, I find all three employees eligible to vote and recommend the challenges to their ballots be overruled.

Pursuant to the Decision and Direction of Election (D&DE) issued on February 8, 2005,¹ by the Regional Director for Region 20, the National Labor Relations Board (NLRB or Board) conducted a secret ballot election among the employees in the following appropriate unit:

All full-time and regular part-time truck drivers and yard employees employed by the Employer at its San Rafael, California, facility during the payroll period ending February 3, 2005.

At the conclusion of the ballot count on March 23, the Regional Director caused to be served on the parties a copy of the official tally of ballots showing the following results:

Approximate number of eligible voters	10
Number of void ballots	0
Number of votes cast for the Petitioner	5
Number of votes cast against participating labor organization	2
Number of valid votes counted	7
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	10

As reflected in the above tally, sufficient challenged ballots exist to affect the election result. On March 29, the Petitioner filed timely objections to the election.

¹ Where not shown otherwise, all further dates refer to the 2005 calendar year.

Following an investigation under Section 102.69 of the Board's Rules and Regulations, the Regional Director issued a Report on Challenged Ballots and Objections, and notice of hearing dated April 19. In that Report, the Regional Director concluded that substantial and material issues of fact existed with respect to the three challenged ballots and Petitioner's objections. Accordingly, he ordered a hearing to resolve those issues. On April 27, the Regional Director approved the withdrawal of Petitioner's objections and ordered that the hearing be limited to the issues arising from the three challenged ballots. Board Exhibit 1(h).

I conducted the hearing concerning the challenged ballots at San Francisco, California, on May 3. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

FINDINGS OF FACT

A. *The Challenged Ballots of Guadalupe and Jimenez*

The Board agent and the Petitioner challenged the ballots of J. Guadalupe and Alvaro Jimenez when they appeared to vote at the election on the ground that their names did not appear on the voting list. During the administrative investigation, the Employer explained that it inadvertently failed to include these two temporarily laid-off employees names on the preelection *Excelsior* list. Board Exhibit 1(f):2. At the hearing, Petitioner did not contest the Employer's assertion and withdrew its challenge to these two ballots with my approval. As no evidence shows that employees Guadalupe and Jimenez to be ineligible to vote, I recommend that the challenges to their ballots be overruled and that they be opened and counted.

B. *The Challenged Ballot of Nick Hultberg Sr.*

The Employer challenged Hultberg's eligibility to vote on the ground that he submitted notices terminating his employment agreement with the Employer prior to the election.

As found in the D&DE, the terms and conditions of employment of the Employer's driver employees are contained in an "Owner/Operator/Transporter Agreement" (agreement) between each driver and the Employer. Hultberg executed such an agreement on August 18, 2000, and has worked continuously for the Employer since then. By its terms, Hultberg's agreement is effective for a "period of 60 months, commencing on delivery of truck." Petitioner's Exhibit 1:1. Hultberg's agreement automatically renews itself unless one of the parties gives notice to terminate the agreement "not later than 180 days prior to the termination date" of the agreement. Petitioner's Exhibit 1:6.

On February 14, Hultberg provided the Employer's owner, Fred Grange, with a written notice of his intent to terminate the agreement. The letter states:

Please accept this as written notification that as of the anniversary of my contract, August 18, 2005, I choose [sic] not to renew said contract. On that date, I will cease working at Grange Debris Box. This is done to satisfy the terms of my contract, even though such contract may be deemed null and void. Should you request it of me, two weeks prior to my

leaving, I will submit an official notice of my intention to terminate my working relationship with you on that date.

Petitioner's Exhibit 2.

Subsequently, Grange asserted, in effect, that Hultberg's February 14 notice sought to prematurely terminate the agreement because Hultberg had not placed his truck in service until substantially after he executed the written agreement. For that reason, Hultberg sent a more detailed notice to Grange dated March 14. It states in pertinent part:

Please accept this as an updated written notification that as of the anniversary of my contract, August 18, 2005 I choose [sic] not to renew said contract. I received my truck from ACME Truck Parts & Equipment Inc. on November 7, 2000 and November 7, 2005 is the date sub-paragraphed in my contract as the final release or non-renewal date of my contract with Grange Debris Box. On that date, I will cease working at Grange Debris Box. This is done to satisfy the terms of my contract, even though such contract may be deemed null and void. Should you request it of me, two weeks prior to my leaving, I will submit an official notice of my intention to terminate my working relationship with you on that date. I still reserve the right to renew/re-negotiate a new contract with Grange Debris Box should I intend to do so at any time prior to the end of my said contract.

Petitioner's Exhibit 3.

Regardless of these two notices, Hultberg continued working for the Employer without interruption right up to the date of this hearing.² Moreover, he credibly testified that he sent these two notices solely to forestall the automatic renewal of his agreement. In any event, he plans to continue working for the Employer at least through November 7. In addition, Hultberg also credibly testified that he would work beyond November 7 if he succeeds in negotiating another agreement with Grange. However, Hultberg admitted that he has had discussions about selling his truck to another enterprise, relinquishing his apartment in the area, and moving to Sacramento. But, to date, Hultberg has not sought employment elsewhere.

The Employer argues that Hultberg's agreement-termination notices, provided before the election, establish that he "effectively resigned his employment with Grange." For this reason, the Employer contends that Hultberg was not eligible to vote in the election. The Petitioner contends that Hultberg met the eligibility requirements as he worked continuously for the employer through the payroll eligibility date specified in the D&DE and at all times thereafter, including the date of the election.

In order to qualify as a voter in an NLRB representation election, an employee ordinarily must be (1) employed in the appropriate unit during the established eligibility period, here the payroll period ending February 3, and (2) in employee status on the date of the election. See *Dakota Fire Protection*,

² Apparently, Hultberg worked for the Employer driving an Employer-provided truck from August 18, 2000, when he executed his agreement, to November 7, 2000, when he put his own truck in service. The agreement provides for such a contingency. Petitioner's Exhibit 1:1.

Inc., 337 NLRB 92 (2001), citing *Plymouth Towing Co.*, 178 NLRB 651 (1969). Hultberg unquestionably met both eligibility requirements.

The Employer's contentions about Hultberg's lack of eligibility lack merit. Hultberg's agreement-termination notices cannot reasonably be construed as an immediate resignation notice. His postnotice work record proves that beyond all doubt. Instead, I find Hultberg sent the termination notices to forestall automatic renewal of his existing work agreement. Although it might well be that Hultberg's employment could eventually be affected, that eventuality is far in the future and purely speculative at this early date. The Employer's apparent argument that the Board should assess Hultberg's community of interest with the unit found appropriate on conditions that may or may not exist 6 or more months from now would throw the entire election process established under Section 9 into turmoil and completely destabilize the system for the selection of employee representatives. The Employer makes no case for such a radical departure from the Board's historical eligibility rules.

Inasmuch as Hultberg actively worked on the requisite eligibility dates and continuously thereafter, I find him eligible to

vote in the election the Regional Director directed in this case. Accordingly, I recommend that the challenge to his ballot be overruled and that his ballot be opened and counted.

Based on the foregoing findings and conclusions, I issue the following recommended³

ORDER

This case is hereby remanded to the Regional Director for Region 20 with directions to open and count the challenged ballots of J. Guadalupe, Alvaro Jimenez, and Nick Hultberg Sr.; prepare a revised tally of ballots; and issue an appropriate certification.

Dated, San Francisco, CA May 10, 2005

³ Within 14 days from the issuance of this supplemental decision, any party may file exceptions to it with the Board in Washington, D.C. Section 102.69 requires that a party filing exceptions must file an original and eight copies with the Board together with a supporting brief, if desired. Any party filing exceptions must immediately serve a copy thereof on all other parties, and the Regional Director. Exceptions, if any, must be received by the Board in Washington, D.C. on or before May 24, 2005.